Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

WESLEY LACUESTA, RONALD HENSINGER AND JOHN DENKO,

Petitioners,

v.

ROSE ARCHULETA, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MARVIN ARCHULETA,

Respondent.

On Petition For A Writ Of Certiorari To The New Mexico Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fourth Amendment's objective reasonableness standard for excessive force is different from 42 U.S.C. § 1983's objective reasonableness standard for qualified immunity.

2. Whether a court's finding that there are genuine issues of material fact in dispute regarding the existence of a Fourth Amendment excessive force violation is sufficient, standing alone, to support automatically that court's denial of a defendant's motion for summary judgment based on 42 U.S.C. § 1983 qualified immunity.

3. Whether this Court's holding in *Anderson v. Creighton* – that 42 U.S.C. § 1983's qualified immunity standard of objective reasonableness is different from the Fourth Amendment's probable cause standard – applies to Fourth Amendment excessive force cases as well.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 10

I. THE NEW MEXICO COURT OF APPEALS DECISION CONFLICTS WITH DECISIONS OF THE FOURTH AND FIFTH CIRCUITS HOLDING THAT THE FOURTH AMENDMENT EXCESSIVE FORCE OBJECTIVE REASONABLENESS INQUIRY AND THE QUALIFIED IMMUNITY OBJECTIVE REASONABLENESS INQUIRY OF 42 U.S.C. § 1983 ARE DIFFERENT. IT ALSO CONFLICTS WITH A DECISION OF THE DISTRICT OF COLUMBIA COURT OF APPEALS SO HOLDING 13

A. The conflict with decisions of the Fourth and Fifth Circuits 13

B. The split in the circuits 15

C. The conflict with a decision of the District of Columbia Court of Appeals 17

II. THE NEW MEXICO COURT OF APPEALS DECISION CONFLICTS IN PRINCIPLE WITH THIS COURT'S RULING IN *ANDERSON V. CREIGHTON* 18

TABLE OF CONTENTS – Continued

Page

III. WHETHER THE FOURTH AMENDMENT EXCESSIVE FORCE STANDARD OF OBJECTIVE REASONABLENESS AND 42 U.S.C. § 1983'S QUALIFIED IMMUNITY STANDARD OF OBJECTIVE REASONABLENESS ARE IDENTICAL IS AN IMPORTANT ISSUE FOR STATE AND LOCAL GOVERNMENTS AND THEIR LAW ENFORCEMENT OFFICERS, AS WELL AS FOR THE UNITED STATES AND ITS LAW ENFORCEMENT OFFICERS..... 21

A. Confusion because of similar language ... 21

B. Overdeterrence, federalism and rule of law values..... 22

C. The interest of the United States 24

D. The roles of judge and jury in the qualified immunity inquiry 24

CONCLUSION 26

APPENDIX .....App. 1

TABLE OF AUTHORITIES

Page

CASES

Act Up!/Portland v. Bagley, 988 F.2d 868 (9th Cir. 1993) 25

Alexander v. County of Los Angeles, 64 F.3d 1315 (9th Cir. 1995) 16

Anderson v. Creighton, 483 U.S. 635 (1987) ..... *passim*

Brown v. Glossip, 878 F.3d 871 (5th Cir. 1989) 14

County of Sacramento v. Lewis, 523 U.S. 833 (1998) 11

Davis v. Yovella, 110 F.3d 63, 1997 WL 159363 (6th Cir. 1997) 16

District of Columbia v. Evans, 644 A.2d 1008 (D.C.C.A. 1994) 17

Franzell v. Flanigan, 102 F.3d 877 (7th Cir. 1996) 16

Graham v. Connor, 490 U.S. 386 (1989) 10, 15, 18, 22

Harlow v. Fitzgerald, 457 U.S. 800 (1982) ..10, 16, 19, 22, 23

Humphrey v. Staszak, 148 F.3d 791 (7th Cir. 1998)....12, 20

Hunter v. Bryant, 502 U.S 224 (1991)..... 23, 24, 25, 26

Lubke v. Boise City/Ada County Housing Authority, 124 Idaho 450 (1993) 25, 26

Malley v. Briggs, 475 U.S. 335 (1986).....19, 23

Mitchell v. Forsyth, 472 U.S. 511 (1985) 2, 19

Nelson v. County of Wright, 162 F.3d 986 (8th Cir. 1998) 17

Oliveira v. Mayer, 23 F.3d 642 (2d Cir. 1994) 25

TABLE OF AUTHORITIES – Continued

Page

Quezada v. County of Bernalillo, 944 F.2d 710 (10th Cir. 1991) 16

Rizzo v. Goode, 423 U.S. 362 (1976) 23

Roy v. City of Lewiston, 42 F.3d 691 (1st Cir. 1994) 16

Scott v. District of Columbia, 101 F.3d 748 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1231 (1997)..... 16

Siegert v. Gilley, 500 U.S. 226 (1991) 11

Slattery v. Rizzo, 939 F.2d 213 (4th Cir. 1991).... 13, 14, 17

Snyder v. Trepagner, 142 F.3d 791 (5th Cir. 1998), *cert. granted*, 119 S.Ct. 863, *cert. dismissed pursuant to Rule 46*, 119 S.Ct. 1493 (1999) 14, 24

Sprague v. City of Burley, 109 Idaho 656 (1985)..... 18

Street v. Parham, 929 F.2d 537 (10th Cir. 1991) 17

Tennessee v. Garner, 471 U.S. 1 (1985) 10

Wilson v. Meeks, 52 F.3d 1547 (10th Cir. 1995) 12

STATUTES

28 U.S.C. § 1257(a) 2

42 U.S.C. § 1983..... *passim*

New Mexico Tort Claims Act, NMSA 1978, §§ 41-4-1 to -27 8

CONSTITUTIONS

U.S. Constitution, Fourth Amendment..... *passim*

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

L. Eskow and K. Cole, *The Unqualified Paradoxes of Qualified Immunity: Reasonably Mistaken Beliefs, Reasonably Unreasonable Conduct, and the Specter of Subjective Intent that Haunts Objective Legal Reasonableness*, 50 Baylor L. Rev. 869 (1998) 20

S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 (4th ed. 1997 and 1999 Update) 25

PETITION FOR A WRIT OF CERTIORARI

Wesley LaCuesta, Ronald Hensinger and John Denko respectfully petition for a writ of certiorari to review the judgment of the New Mexico Court of Appeals

OPINIONS IN THIS CASE

The New Mexico District Court, the trial court, granted petitioners' motion for partial summary judgment on qualified immunity grounds on May 2, 1997, and also denied the respondent's motion for relief from that order on March 18, 1998. Thereafter, on interlocutory review, the New Mexico Court of Appeals reversed the New Mexico District Court in an opinion by Judge Wechsler (Judge Hartz concurring) dated July 2, 1999. 1999-NMCA-113, ___ N.M.___, No. 19,299 (July 2, 1999). On August 12, 1999, the New Mexico Supreme Court denied certiorari. 1999-NMSC-___, ___ N.M. ___, No. 25,869 (August 12, 1999).

GROUNDS ON WHICH THIS COURT'S JURISDICTION IS INVOKED

The decision of the New Mexico Court of Appeals reversing the trial court and denying petitioners' motion for summary judgment based on section 1983 qualified immunity was entered on July 2, 1999. The New Mexico Supreme Court denied petitioners' petition for writ of certiorari on August 12, 1999.

This Court has certiorari jurisdiction over the challenged decision of the New Mexico Court of Appeals pursuant to 28 U.S.C. § 1257(a) because an "immunity is specially set up or claimed under the . . . statutes of . . . the United States." Further, the New Mexico Court of Appeals decision denying the petitioners' motion for summary judgment based on 42 U.S.C. § 1983 qualified immunity is an appealable interlocutory order under *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1983 reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless such a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This case is a 42 U.S.C. § 1983 damages action brought against petitioners Wesley LaCuesta, Ronald Hensinger and John Denko arising out the allegedly unconstitutional use by LaCuesta of deadly force against decedent Marvin Archuleta.

Facts On the night of March 3, 1994, New Mexico State Police Officer Wesley LaCuesta and New Mexico State Police Sergeant Ronald Hensinger responded to a domestic disturbance call at the home of Marvin Archuleta and his ex-wife Lorraine Archuleta. When they arrived at the scene, Ms. Archuleta had blood on her face and what appeared to be a gash on her nose. She told Officer LaCuesta, who observed that she was extremely frightened, that her ex-husband had done this to her. Shortly after that, Sgt. Hensinger encountered Marvin Archuleta outside near his home. Archuleta was yelling and acting in a belligerent manner, yelling obscenities at the officer, and generally acting in an abusive and uncooperative fashion. At or around this time, Archuleta threw a rock in the direction of Sgt. Hensinger. *See* Record on Appeal[1] (hereafter "ROA") at 1533.

The two police officers then approached Marvin Archuleta to talk to him, to try to calm him down, and to generally find out what had happened. It was a very dark night, with little illumination except for the two police officers' flashlights, which they shined in the general direction of Archuleta. *See* ROA at 1497 and 1533. As he

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[1] The Record on Appeal refers to the record before the New Mexico Court of Appeals.

got closer to Archuleta, Officer LaCuesta noticed that Archuleta had a knife in his hand, and warned Sgt. Hensinger of this fact. He also ordered Archuleta to freeze and to get on the ground. *See* ROA at 1497 and 1533. At approximately the same time, Sgt. Hensinger also noticed that Archuleta had a knife in his hands. *See* ROA at 1533.

Upon seeing a knife in Archuleta's hand, Officer LaCuesta drew his service weapon and held it down at the low ready. Officer LaCuesta did this in order to protect himself and Sgt. Hensinger. *See* ROA at 1497. Upon hearing Officer LaCuesta's warning about the knife, and his ordering Archuleta to freeze, Sgt. Hensinger also drew his service weapon and held it down at the low ready. Sgt. Hensinger did this in order to protect himself and Officer LaCuesta. *See* ROA at 1533.

Archuleta turned away from the officers, and started to run away from them through the trees. The two police officers pursued him. The rolling, uneven, tree-covered terrain was essentially dirt and rocks, hilly in some places, flat in other places, with scattered pinon trees and other plants. At various times, Archuleta would stop to confront the officers, and then proceed to run away from them again. Occasionally, Archuleta would make motions as if to throw something at the officers. The two police officers were struggling to try to keep Archuleta in sight with their flashlights and struggling to maintain what they believed to be an adequate and safe distance from him, while at the same time making efforts to try to resolve the situation. *See* ROA at 1497-1498 and 1534.

During the encounter, Marvin Archuleta continued his belligerent and aggressive and abusive conduct, yelling obscenities and such, and refusing to obey Officer LaCuesta's orders. Officer LaCuesta repeatedly ordered Archuleta to get on the ground, to put the knife down, to calm down, to talk to them, that it wasn't worth it, etc. Archuleta refused, and instead responded with more obscenities and other aggressive and uncooperative conduct. *See* ROA at 1498 and 1534. Officer LaCuesta continued to order Archuleta to get on the ground, to freeze, and to otherwise stop his threatening actions. Archuleta did not obey the officer's lawful orders. Officer LaCuesta pleaded with Archuleta to give up, saying things such as: "put the knife down, it's not worth it"; "stop or I'll shoot you"; "what do you want to do this for"; "come on man it's not worth it"; "relax man, it's not worth it"; "talk to us please"; "calm down man", "talk to us at least man", "it's not worth it man . . . you don't want to do this- . . . can't we just get along"; "don't do that man"; "get over this man . . . it's not worth it", and other such related words. *See* ROA at 1498 and 1534.

Archuleta responded by saying such things as: "you guys come near me, I'm gonna fuck you up"; "not going down that easy"; "you know me partner, I'll fuckin' dive on in"; "I don't miss bro"; "I don't fucking miss"; "I'll fuckin' let him have it"; "get the fuck away from me"; "I don't give a fuck"; "come on get close to me . . . I'll kill all you fuckers"; "Come on . . . fucker", and other such related words. *See* ROA at 1498 and 1534. During this chase, Archuleta would periodically stop, and then take off running again. A time or two, he put the knife up to his own throat. At other times, he threatened the officers

with the knife. After traveling approximately 75-100 yards through a pinon tree covered area, Archuleta made his way onto a dirt roadway. *See* ROA at 1498 and 1535.

There quickly came a time where Officer LaCuesta was approximately 18-22 feet away from Marvin Archuleta, and Sgt. Hensinger was approximately 12-15 feet away from Marvin Archuleta in a triangulated position. *See* ROA at 1498-1499 and 1535. Events were moving fast and the situation was fluid, dangerous, tense, and very unpredictable. Archuleta was constantly moving around, waving his arms up and down, making threatening motions and statements, and moving his body from side to side. *See* ROA at 1499 and 1535.

At this time, with the knife in his left hand, and another instrument later identified as a sharpening steel in the right hand,[2] Archuleta made a threatening motion toward, and in the direction of, Sgt. Hensinger, the officer who was closest to him. *See* ROA at 1499 and 1535. Officer LaCuesta observed Archuleta aggressively lunge towards Sgt. Hensinger, and move to close the distance between them. *See* ROA at 1499. At the same time, Sgt. Hensinger observed that Archuleta, with the sharpening steel in his right hand, brought it over his right shoulder in a throwing fashion, and started to lunge in Sgt. Hensinger's direction. *See* ROA at 1535.

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[2] A sharpening steel is a thick file-like metal object used to sharpen knives, which in this case was approximately 18 inches long.

Both police officers believed that by his movements, Archuleta presented an immediate threat of serious physical harm or death to Sgt. Hensinger. Both police officers were called upon to make a split-second decision on how to react in a very tense situation. Upon observing this action on the part of Archuleta, both police officers raised their service weapons from the low ready position, to the high ready position, and then to the target area fire position. Both officers made the decision to fire their service weapons to stop the life-threatening action of Marvin Archuleta. *See* ROA at 1499 and 1535.

Officer LaCuesta aimed his service weapon at the center mass target area of Marvin Archuleta and fired one round that struck him in the upper left chest area and killed him. *See* ROA at 1499 and 1536. Officer LaCuesta's purpose in doing so was to stop the life-threatening action of Marvin Archuleta towards Sgt. Hensinger. *See* ROA at 1499.

Just before Officer LaCuesta shot Archuleta, Sgt. Hensinger had come up to target area fire position and proceeded to squeeze his trigger, intending to fire his service weapon at the center mass target area of Archuleta. Sgt. Hensinger's purpose in doing so was to stop the life-threatening action of Archuleta against him. When Sgt. Hensinger heard Officer LaCuesta's service weapon go off, and noticed that Archuleta had dropped out of his gun sight, he relieved the pressure on his trigger and did not fire his service weapon. *See* ROA at 1535.

This entire sequence of events took approximately three to four minutes.[3]

Judicial Proceedings Following the above events, respondent, the Estate of Marvin Archuleta, in an amended complaint filed on October 12, 1995, in New Mexico District Court, alleged two causes of action. The first was against Officer LaCuesta, Sgt. Hensinger, Chief Denko (then Chief of the New Mexico State Police), the New Mexico State Police and the New Mexico Department of Public Safety under the New Mexico Tort Claims Act, NMSA 1978, §§ 41-4-1 to -27 (1976, as amended through 1996) ("TCA"). The second count, which is of concern here, was a 42 U.S.C. § 1983 Fourth Amendment damages action against petitioners LaCuesta, Hensinger and Denko in their individual capacities alleging the use of excessive force against decedent Marvin Archuleta. LaCuesta was personally accused of using excessive force while Hensinger and Denko were sued under supervisory liability and failure to intervene theories.

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[3] Other than Officer LaCuesta, Sgt. Hensinger, and Archuleta, there were no witnesses to the shooting incident when Archuleta made the threatening motion towards Sgt. Hensinger, and was shot by Officer LaCuesta. *See* ROA at 1499 and 1536. However, during this entire sequence, when he first began speaking to Lorraine Archuleta past the time the shot was fired, Officer LaCuesta had been continuously recording the entire incident, without interruption, on the micro-cassette recorder in his upper right shirt pocket. *See* ROA at 1499. The transcript prepared by the New Mexico State Police, and the comparison transcript prepared by Mr. Anthony Pellicano, of the micro-cassette recording made by Officer LaCuesta during his and Sgt. Hensinger's encounter with Archuleta, accurately reflect what transpired. *See* ROA at 1500 and 1536.

Petitioners filed motions for summary judgment as to both of respondent's claims on March 10, 1997. The trial court granted partial summary judgment in their favor as to the § 1983 claims but allowed the TCA claims to go forward, with the result that a jury found that petitioners negligently caused a battery to be commited on decedent. On May 23, 1997, the jury found damages in the amount of $1,758,584.20 and apportioned the negligence as follows: LaCuesta (10%), Hensinger (38%), Denko (10%) and decedent (42%). Because New Mexico's damages cap of $400,000 applied to this case, respondent challenged the cap's constitutionality. This question, after having made its way to the New Mexico Supreme Court on interlocutory appeal, is now before the New Mexico District Court.

For present purposes, what is significant is that, after the trial on the TCA claims, respondent filed a motion for relief from the May 2, 1997, order that had granted partial summary judgment to petitioners. The trial court denied this motion by interlocutory order because no final order on the TCA claims had been entered. Respondent then filed an application for an interlocutory appeal, which the New Mexico Court of Appeals granted. Thereafter, on July 2, 1999, the New Mexico Court of Appeals reversed the trial court's denial of respondent's motion for relief from the grant of partial summary judgment to petitioners and, rejecting petitioners' arguments on this issue, ruled that because, in its view, there were genuine issues of material fact in dispute regarding the underlying Fourth Amendment violation allegedly committed by Officer LaCuesta, he was for that reason *automatically* not entitled to partial summary judgment based on qualified

immunity. It also ruled that, for this reason, Sgt. Hensinger and Chief Denko were similarly not entitled to partial summary judgment on respondent's supervisory liability and failure to intervene claims against them. However, it remanded with instructions to the trial court to consider other independent grounds that Hensinger and Denko had not argued in their appeal.

Petitioners, joined by the New Mexico State Police and the New Mexico Department of Public Safety, then filed a petition for writ of certiorari in the Supreme Court of New Mexico, which was denied on August 12, 1999. In that petition they raised the Fourth Amendment/§ 1983 qualified immunity issue that is the subject of this Petition for Writ of Certiorari and argued, just as they do here, that the New Mexico Court of Appeals erred in conflating the Fourth Amendment violation question and § 1983's qualified immunity question.

REASONS FOR GRANTING THE WRIT

This case raises an important § 1983 interpretation issue that has caused considerable confusion, as well as a split, in the circuits and the states in the wake of this Court's decisions in *Tennessee v. Garner*, 471 U.S. 1 (1985) and *Graham v. Connor*, 490 U.S. 386 (1989), which held that § 1983 Fourth Amendment excessive force claims (including those involving deadly force) are governed by an objective reasonableness standard, and in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *Anderson v. Creighton*, 483 U.S. 635 (1987), which ruled that the § 1983 qualified

immunity defense is based on the objective reasonableness of the challenged conduct in light of preexisting law.

The New Mexico Court of Appeals erroneously treated these two inquiries as identical, and made the Fourth Amendment excessive force inquiry *automatically* determinative of the petitioners' entitlement to qualified immunity. Thus, after it asserted that the question before it was whether there were any genuine issues of material fact in dispute in connection with the "objective reasonableness" of Officer LaCuesta's action in shooting Archuleta under the circumstances, it explained as a matter of Fourth Amendment doctrine that "[t]he reasonableness of [Officer LaCuesta's] shooting Archuleta depends on whether he had probable cause to believe that Archuleta posed a significant threat of death or serious physical injury." Applying this Fourth Amendment standard, the New Mexico Court of Appeals then determined that there were genuine issues of material fact in dispute with respect to the Fourth Amendment violation and *erroneously leaped* to the conclusion that LaCuesta, and Hensinger and Denko as well, were therefore not entitled to qualified immunity.[4]

However, what the Court of Appeals should have done next was to consider the *analytically distinct*

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[4] Of course, petitioners do not concede that there were genuine issues of material fact in dispute regarding the underlying Fourth Amendment violation. The New Mexico Court of Appeals erred in making this determination by denying summary judgment on the merits. *See Siegert v. Gilley*, 500 U.S. 226 (1991) and *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), stating that the merits can be a threshold question in the qualified immunity inquiry.

question of whether, even if there might be a Fourth Amendment violation, there were genuine issues of material fact in dispute as to whether Officer LaCuesta could reasonably have believed under the circumstances that his conduct was lawful in light of preexisting law, namely, was there "arguable reasonable force." *Humphrey v. Staszak*, 148 F.3d 791 (7th Cir. 1998) (using "arguable probable cause" standard for qualified immunity and observing that the Second, Eighth and Eleventh Circuits did the same). Had the New Mexico Court of Appeals made the correct qualified immunity inquiry, it would have found that there was indeed "arguable reasonable force" used, *see Wilson v. Meeks*, 52 F.3d 1547 (10th Cir. 1995), and hence would have affirmed the trial court's grant of summary judgment in his favor.

This case is an appropriate vehicle for this Court to resolve the matter to provide clear and unequivocal guidance to state and federal courts. Further, resolving the matter will provide guidance to law enforcement officers who are often called upon to make extraordinarily difficult split-second decisions in tense and dangerous circumstances and who, as a consequence, are frequently sued for allegedly using excessive force. This Court should grant certiorari, hold that the two inquiries are not identical, reverse the New Mexico Court of Appeals and rule that petitioners are entitled to qualified immunity. Restoring this qualified immunity protection will minimize the overdeterrence of law enforcement officers, promote fairness and further important interests in federalism. It will also reduce the significant costs imposed on state and local governments in defending these § 1983 lawsuits.

I. THE NEW MEXICO COURT OF APPEALS DECISION CONFLICTS WITH DECISIONS OF THE FOURTH AND FIFTH CIRCUITS HOLDING THAT THE FOURTH AMENDMENT OBJECTIVE REASONABLENESS STANDARD AND THE QUALIFIED IMMUNITY OBJECTIVE REASONABLENESS STANDARD OF 42 U.S.C. § 1983 ARE DIFFERENT. IT ALSO CONFLICTS WITH A DECISION OF THE DISTRICT OF COLUMBIA COURT OF APPEALS SO HOLDING.

A. The conflict with decisions of the Fourth and Fifth Circuits

In contrast to the New Mexico Court of Appeals, at least two circuits have soundly held that the Fourth Amendment excessive force standard and the qualified immunity standard are different. The Fourth Circuit so ruled in *Slattery v. Rizzo*, 939 F.2d 213 (4th Cir. 1991), which reversed an interlocutory order of a district court denying a police officer qualified immunity from liability for the alleged use of excessive force. In an opinion by Justice Powell, sitting by designation, the Fourth Circuit rejected the position of the district court which had determined that qualified immunity was not available in excessive force cases. It stated: "There is no principled reason not to allow a defense of qualified immunity in an excessive use of force claim, when it is allowed in other actions alleging violations of the fourth amendment. The interests served by the principle of qualified immunity are present in all suits alleging violations of the fourth amendment." *Id.* at 215.

The Fourth Circuit then went on to find that the police officer was entitled to qualified immunity

protection. It pointed out once more that "qualified immunity affords government officials greater protection than a simple defense on the merits. Furthermore, the purpose of qualified immunity is to remove most civil liability actions, except those where the officials clearly broke the law, from the legal process well in advance of the submission of facts to a jury." *Id.* at 216.

Similarly, in a circuit decision with which this Court is familiar, *Snyder v. Trepagnier*, 142 F.3d 791 (5th Cir. 1998), *cert. granted*, 119 S.Ct. 863, *cert. dismissed pursuant to Rule 46*, 119 S.Ct. 1493 (1999),[5] the Fifth Circuit upheld against a claim of inconsistency a jury verdict (in the form of answers to special interrogatories) which found at one and the same time that the defendant police officer had violated the plaintiff's Fourth Amendment rights but was nevertheless protected by qualified immunity. It declared: "There is no inherent conflict between a finding of excessive force and a finding of qualified immunity." *Id.* at 800. Citing its decision in *Brown v. Glossip*, 878 F.3d 871, 873-74 (5th Cir. 1989), the Fifth Circuit observed that it had "squarely held 'that qualified immunity is available as a defense to monetary liability for an objectively unreasonable use of excessive force under the Fourth Amendment.' " *Id.* While petitioners disagree with the Fifth Circuit in *Snyder* that qualified immunity, as such,

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[5] This Court had granted certiorari in *Snyder* to deal with the following question presented *which is substantially similar to that presented in this Petition for Writ of Certiorari*: "1. Whether a jury finding that an officer violated the Fourth Amendment to the Constitution by using excessive force necessarily precludes a finding of qualified immunity, so as to make such dual findings irreconcilable."

can ever properly be a jury question,[6] they do agree that the Fourth Amendment objective reasonableness standard and the § 1983 qualified immunity objective reasonableness standard are different.

Petitioners observe that the decisions of the Fourth and Fifth Circuits are consistent with this Court's language in *Graham v. Connor, supra*. There, the Court stated: "[T]he officer's objective 'good faith' – that is, whether he could reasonably have believed that the force used did not violate the Fourth Amendment – may be relevant to the availability of the qualified immunity defense to monetary liability under § 1983. Since no claim of qualified immunity has been raised in this case, however, we express no view as to its proper application in excessive force cases that arise under the Fourth Amendment." *Graham v. Connor*, 490 U.S. at 399 n.12. This language indicates that the two standards are indeed different.

B. The split in the circuits

Not only does the New Mexico Court of Appeals decision conflict with decisions of the Fourth and Fifth Circuits, but the circuits themselves are split on the Fourth Amendment excessive force/qualified immunity issue. Indeed, a majority of the circuits have erroneously held that the Fourth Amendment excessive force standard and the qualified immunity objective reasonableness standard are identical, thereby creating a conflict with the Fourth and Fifth Circuits.

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[6] See Argument IIID *infra*.

The circuits in the majority include: the District of Columbia Circuit, *see Scott v. District of Columbia*, 101 F.3d 748 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1231 (1997); the First Circuit, *see Roy v. City of Lewiston*, 42 F.3d 691 (1st Cir. 1994); the Sixth Circuit, *see Davis v. Yovella*, 110 F.3d 63, 1997 WL 159363, **4 (6th Cir. 1997) (unpublished opinion) ("The objective reasonableness standard for entitlement to qualified immunity, as established in *Harlow* and *Anderson*, remains the same with a Fourth Amendment [excessive force] violation."); the Seventh Circuit, *see Franzell v. Flanigan*, 102 F.3d 877, 886-87 (7th Cir. 1996) ("[O]nce a jury has determined under the Fourth Amendment that the officer's conduct [in using excessive force] was objectively unreasonable, that conclusion necessarily resolves for immunity purposes whether a reasonable officer could have believed that his conduct was lawful."); the Ninth Circuit, *see Alexander v. County of Los Angeles*, 64 F.3d 1315 (9th Cir. 1995) ("This Court has observed that the inquiry as to whether officers are entitled to qualified immunity for the use of excessive force is the same as the inquiry on the merits of the excessive force claim."); and the Tenth Circuit, *see Quezada v. County of Bernalillo*, 944 F.2d 710, 718 (10th Cir. 1991) ("While qualified immunity is a powerful defense in other contexts, in excessive force cases the substantive inquiry that decides whether the force exerted by police was so excessive that it violated the Fourth Amendment is the same inquiry that decides whether the qualified immunity

defense is available to the government actor.") and *Street v. Parham*, 929 F.2d 537 (10th Cir. 1991).[7]

C. The New Mexico Court of Appeals decision conflicts with a decision of the District of Columbia

The New Mexico Court of Appeals decision also conflicts with a decision of the District of Columbia which has taken the same position on this issue as the Fourth and Fifth Circuits. In *District of Columbia v. Evans*, 644 A.2d 1008, 1017 (D.C.C.A. 1994), the District of Columbia Court of Appeals ruled that the defendant officers were protected by qualified immunity *even though* a jury found that they had violated the Fourth Amendment when they used deadly force against the decedent. The court stated: "Without question, then, qualified immunity can provide a valid defense to a § 1983 claim for excessive use of force."[8]

Consequently, this Court should grant certiorari and resolve the conflict between the New Mexico Court of Appeals and the Fourth and Fifth Circuits as well as with

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[7] As of this writing, the Eighth Circuit has expressly left open the question of whether there is "any conceptual difference in the standards." *Nelson v. County of Wright*, 162 F.3d 986, 990 n.5 (8th Cir. 1998).

[8] It cited as authority the opinion of Justice Powell, sitting as a circuit judge in *Slattery v. Rizzo*, 939 F.2d 213 (4th Cir. 1991), discussed *supra*.

the District of Columbia. By so doing, this Court will also eliminate the split in the circuits.[9]

II. THE NEW MEXICO COURT OF APPEALS DECISION CONFLICTS IN PRINCIPLE WITH THIS COURT'S RULING IN *ANDERSON V. CREIGHTON*.

It is not only the conflict between the New Mexico Court of Appeals and the Fourth and Fifth Circuits as well as with the District of Columbia on the Fourth Amendment excessive force standard and § 1983's qualified immunity standard that warrants this Court's grant of certiorari here. The New Mexico Court of Appeals decision, insofar as it treats the two standards as identical, also conflicts in principle with this Court's decision in *Anderson v. Creighton*, 483 U.S. 635 (1987).

Anderson dealt with the defendant federal law enforcement officers' entitlement to raise qualified immunity

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[9] There also appears to be a split between the District of Columbia and Idaho. The Supreme Court of Idaho stated in *Sprague v. City of Burley*, 109 Idaho 656, 665 (1985) (citation omitted): "While it is true that a police officer is entitled to 'good faith' or qualified immunity for a warrantless arrest if the officer had probable cause to make the arrest, that good faith immunity applies only to an allegation of false arrest, not to an allegation that the force used in effecting the arrest was excessive." The court reasoned that "such a use of force is, by definition, unreasonable and a deprivation of constitutional rights." *Id.* at 668. Although *Sprague* was decided before *Graham*, it applied a Fourth Amendment standard to the excessive force claim and apparently remains good law in Idaho.

where they allegedly violated the Fourth Amendment in conducting a warrantless search without probable cause. This Court, in an opinion by Justice Scalia, ruled that "a federal law enforcement officer who participates in a search that violates the Fourth Amendment may [not] be held personally liable for money damages if a reasonable officer could have believed that the search comported with the Fourth Amendment." *Id.* at 636.

More important for present purposes, this Court rejected the argument that it was improperly applying a double standard of reasonableness in favor of law enforcement officers because one cannot "reasonably" act unreasonably. It replied, *id.* at 644:

> The short answer to this argument is that it is foreclosed by the fact that we have previously extended qualified immunity to officials who were alleged to have violated the Fourth Amendment. [citing *Malley v. Briggs*, 475 U.S. 335 (1986) (allegedly unconstitutional arrest) and *Mitchell v. Forsyth*, 472 U.S. 511 (allegedly unconstitutional warrantless wiretaps)] Even if that were not so, however, we would still find the argument unpersuasive. Its surface appeal is attributable to the circumstance that the Fourth Amendment's guarantees have been expressed in terms of "unreasonable" searches and seizures. Had an equally serviceable term such as "undue" searches and seizures been employed, what might be termed the "unreasonably reasonable" argument against application of *Harlow* to the Fourth Amendment would not be available – just as it *would* be available against application of *Harlow* to the Fifth Amendment if the term "reasonable process of law" had been

> employed there. . . . Law enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable should no more be held personally liable in damages than should officials making analogous determinations in other areas of law.

Precisely the same argument applies in the present case. The New Mexico Court of Appeals *erroneously assumed* that once it found that there were genuine issues of material fact in dispute on the Fourth Amendment excessive force question, thereby precluding summary judgment on this matter, then it *automatically* followed that there were also genuine issues of material fact in dispute on the qualified immunity question, thereby precluding summary judgment there as well. But this is the same error as the argument rejected by this Court in *Anderson:* it assumes the identity of the Fourth Amendment and qualified immunity standards just because both contain a reasonableness criterion. Rather, petitioners submit that just as *Anderson* stands for the proposition that there is "arguable probable cause," *Humphrey v. Staszak,* 148 F.3d 791 (7th Cir. 1998) (using "arguable probable cause" standard for qualified immunity), so, too, does it stand for the proposition that there is "arguable reasonable force."[10]

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[10] *See* L. Eskow and K. Cole, *The Unqualified Paradoxes of Qualified Immunity: Reasonably Mistaken Beliefs, Reasonably Unreasonable Conduct, and the Specter of Subjective Intent that Haunts Objective Legal Reasonableness,* 50 Baylor L. Rev. 869 (1998) (arguing for the concept of "reasonably unreasonable force").

Thus, the New Mexico Court of Appeals decision is inconsistent in principle with *Anderson v. Creighton*, as are the views of those circuits noted above (the District of Columbia, First, Sixth, Seventh, Ninth and Tenth Circuits) which take the position that the Fourth Amendment excessive force objective reasonableness standard is identical to § 1983's qualified immunity objective reasonableness standard.

III. WHETHER THE FOURTH AMENDMENT EXCESSIVE FORCE STANDARD OF OBJECTIVE REASONABLENESS AND 42 U.S.C. § 1983'S QUALIFIED IMMUNITY STANDARD OF OBJECTIVE REASONABLENESS ARE IDENTICAL IS AN IMPORTANT ISSUE FOR STATE AND LOCAL GOVERNMENTS AND THEIR LAW ENFORCEMENT OFFICERS, AS WELL AS FOR THE UNITED STATES AND ITS LAW ENFORCEMENT OFFICERS.

The New Mexico Court of Appeals' error in denying petitioners' motion for summary judgment based on qualified immunity solely because it found that there were genuine issues of material fact in dispute regarding the respondent's underlying Fourth Amendment excessive force claim implicates a very important issue that this Court should address.

A. Confusion because of similar language

The linguistic similarity of the Fourth Amendment excessive force standard and the § 1983 qualified immunity standard has led to much confusion. This is perhaps understandable because both the Fourth Amendment inquiry and the qualified immunity inquiry: (1) must be

made from the perspective of a reasonable officer at the scene; (2) are objective in nature; (3) must take account of the fact that police officers often make split-second judgments in dangerous and uncertain circumstances; and (4) are intended to provide law enforcement officers with a margin for error for their mistaken factual assessments. *See generally Graham v. Connor*, 490 U.S. 386, 397 (1989); *Harlow v. Fitzgerald*, 457 U.S. 800, 817-818 (1982).

However, it does not follow that the two standards are identical. Unlike the Fourth Amendment standard, the qualified immunity standard requires the law enforcement officer to consider an additional factor: the requirements of the Fourth Amendment *at the time and under the conditions in which the officer acted*, which are not necessarily the same as the requirements of the Fourth Amendment as determined by the trial judge during the litigation. The qualified immunity standard thus affords a law enforcement officer protection from monetary liability where the relevant Fourth Amendment standard or its application to specific facts was not clearly established at the time of the challenged conduct, even if it turns out after the fact that the officer violated the Fourth Amendment.

Because this issue has percolated in the circuits and the states for at least a decade – *Graham v. Connor* was handed down in 1989 – and has caused such confusion, its resolution is now timely.

B. Overdeterrence, federalism and rule of law values

By effectively eliminating a separate qualified immunity inquiry in Fourth Amendment excessive force cases, the New Mexico Court of Appeals decision (as well as the

decisions of those circuits ruling the same way) overdeters law enforcement officers in the performance of their duties, particularly in dangerous situations. This undercuts the major function of qualified immunity after *Harlow v. Fitzgerald, supra,* and *Anderson v. Creighton, supra*: to provide law enforcement officers and others with a margin for error for the commission of mistakes unless "on an objective basis, it is obvious that no reasonably competent officer would have concluded" that the conduct was lawful. But "if officers of reasonable competence could disagree on this issue, immunity should be recognized." *Malley v. Briggs,* 475 U.S. 335, 341 (1986). Thus, qualified immunity " 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.' " *Hunter v. Bryant,* 502 U.S. 224, 229 (1991) (per curiam) (quoting *Malley,* 475 U.S. at 341, 343).

Treating the two standards as identical also adversely affects the strong federalism interest that state and local governments have in operating their law enforcement departments relatively free from federal judicial involvement. *See Rizzo v. Goode,* 423 U.S. 362 (1976).

Finally, numerous § 1983 Fourth Amendment excessive force damages claims are filed annually against state and local law enforcement officers in the federal and state courts, and in virtually all of them qualified immunity is raised as an affirmative defense. The parties to such litigation, and especially law enforcement officers and their government employers, should know that, as petitioners contend, the Fourth Amendment excessive force standard and the qualified immunity standard are different, and that they, like every other § 1983 individual defendant, are entitled to this second level of protection

from damages liability. The rule of law values of predictability, consistency and fairness will thereby be promoted.

C. The interest of the United States

In addition to state and local governments and their officials who are suable for damages under § 1983, the federal government has a strong interest as well. Thus, the United States described its interest in an amicus brief in support of the respondent law enforcement officer in *Snyder v. Trepagnier, supra,* as follows:

> The United States has a strong interest in that question [– "whether the determination that a law enforcement officer violated the Fourth Amendment 'necessarily precludes' the officer from being entitled to qualified immunity" –] because qualified immunity issues arise when federal employees are sued for allegedly using excessive force in violation of the Fourth Amendment under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971), and because the United States has enforcement obligations with respect to and an interest in the faithful application of the nation's civil rights laws.

D. The roles of judge and jury in the qualified immunity inquiry

Considerable uncertainty remains, even after *Hunter v. Bryant, supra,* about the proper roles of judge and jury in the qualified immunity determination where there are genuine issues of material fact in dispute regarding the

underlying constitutional violation.[11] In this case, for example, the New Mexico Court of Appeals erroneously stated that the qualified immunity question is for the jury where reasonable persons could differ on the underlying facts. But this is inconsistent with *Hunter v. Bryant*. The question whether an official could reasonably have believed that his conduct was constitutional in light of clearly settled law is for the court. This is neither a purely legal inquiry (in which case it would also be for the court) nor a purely factual one (in which case it would be for the jury where reasonable persons could differ). Rather, it is a *law application* question, that is, a mixed question of law and fact. And it is this law application question that, according to petitioners' understanding of *Hunter v. Bryant*, is always for the court.

The error of the New Mexico Court of Appeals reflects a similar uncertainty about this issue in the circuits and states. For example, the Second Circuit stated that where genuine issues of material fact are in dispute in an excessive force case, the qualified immunity issue should be submitted to the jury. *Oliveira v. Mayer*, 23 F.3d 642 (2d Cir. 1994). Yet the Ninth Circuit correctly took the contrary position in *Act Up!/Portland v. Bagley*, 988 F.2d 868 (9th Cir. 1993), *superseding*, 971 F.2d 298 (9th Cir. 1992), as did the Supreme Court of Idaho in *Lubke v. Boise City/Ada County Housing Authority*, 124 Idaho 450 (1993).

Thus, the Court can use this case to clarify the respective roles of judge and jury in § 1983 Fourth

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[11] See the cases collected in S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 8:22 n.14 (4th ed. 1997 and 1999 Update).

Amendment excessive force/qualified immunity cases where the underlying facts may be in dispute. It could make clear, per *Hunter v. Bryant*, that even if the trial court cannot resolve the qualified immunity question prior to trial because there are genuine issues of material fact in dispute that a jury must determine, nevertheless that court should not submit the qualified immunity question as such to the jury. Rather, it should instruct the jury through the use of special interrogatories to make findings of specific facts that the trial court would then use in making the qualified immunity determination. Indeed, this is precisely what the Supreme Court of Idaho suggested in *Lubke v. Boise City/Ada County Housing Authority, supra.*

CONCLUSION

The New Mexico Court of Appeals decision treating the Fourth Amendment excessive force standard and § 1983's qualified immunity standard as identical conflicts with decisions of the Fourth and Fifth Circuits as well as with a decision of the District of Columbia. Also, there is a split in the circuits on this important and recurring issue. Further, the New Mexico Court of Appeals decision conflicts in principle with this Court's decision in *Anderson v. Creighton*. For all of these reasons, petitioners respectfully ask this Court to grant certiorari, hold that the Fourth Amendment objective reasonableness standard is different from § 1983's qualified

immunity standard, reverse the decision of the New Mexico Court of Appeals and rule that petitioners are entitled to qualified immunity.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE
STATE OF NEW MEXICO

Opinion Number _____

Filing Date: (Filed 99 Jul. -2)

Docket No. 19,299

ROSE ARCHULETA, as Personal
Representative of the ESTATE OF
MARVIN ARCHULETA,

Plaintiff-Appellant,

vs.

WESLEY LACUESTA, RONALD HENSINGER,
JOHN DENKO, THE NEW MEXICO STATE
POLICE and THE NEW MEXICO DEPARTMENT
OF PUBLIC SAFETY,

Defendant-Appellees,

and

NEW MEXICO ASSOCIATION OF COUNTIES,
NEW MEXICO MUNICIPAL LEAGUE, THE CITY
OF ALBUQUERQUE, THE REGENTS OF THE
UNIVERSITY OF NEW MEXICO and THE NEW
MEXICO MEDICAL SOCIETY,

Intervenors.

APPEAL FROM THE DISTRICT COURT OF
SAN MIGUEL COUNTY
Jay G. Harris, District Judge

Robert R. Rothstein
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Rothstein, Donatelli, Hughes,
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Robert M. Ortiz
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for Appellant

John E. DuBois
Robert Lohbeck
Risk Management Division,
The State of New Mexico
Santa Fe, NM

for Appellees

OPINION

WECHSLER, Judge.

(1) The Estate of Marvin Archuleta (Estate) appeals the district court's grant of partial summary judgment and the denial of its motion for reconsideration under Rule 1-060(B)(1) NMRA 1999. Partial summary judgment was granted to New Mexico State Police Officers Wesley LaCuesta, Ronald Densinger, and John Denko for the Estate's 42 U.S.C. § 1983 (1994) claim that the officers violated Archuleta's Fourth Amendment right to be free from unreasonable seizure in using excessive force resulting in Archuleta's death. We hold that there are genuine issues of material fact concerning what occurred the night of the shooting and reverse the order granting summary judgment for Officer LaCuesta. We also reverse and remand for reconsideration the order of summary judgment for Officers Hensinger and Denko because it appears that the district court did not assess these claims independently from the claim against Officer LaCuesta.

Background

(2) On the night of March 3, 1994, Officers LaCuesta and Hensinger were pursuing Archuleta after responding to a domestic-disturbance call from Archuleta's wife. During the pursuit, Officer LaCuesta fired his gun and mortally wounded Archuleta. The Estate's complaint alleged two counts. The first count was against Officers LaCuesta, Hensinger, Denko (then Chief of the New Mexico State Police), the New Mexico State Police, and the New Mexico Department of Public Safety under the Tort Claims Act, NMSA 1978, §§ 41-4-1 to -27 (1976, as amended through 1996). The second count was against Officers LaCuesta, Hensinger, and Denko in their individual capacities, alleging violation of Archuleta's constitutional right against unreasonable seizure under 42 U.S.C. § 1983.

(3) Officers LaCuesta, Hensinger, and Denko filed motions for summary judgment asserting the defense of qualified immunity against the 42 U.S.C. § 1983 claim. The Estate filed separate responses to the motions for summary judgment, asserting that there existed genuine issues of material fact precluding summary judgment. In opposing summary judgment, the Estate also filed affidavits, depositions, reports of several experts, and a transcript of the tape recording made by Officer LaCuesta the night of the shooting. Officers LaCuesta and Hensinger filed replies to the Estate's response to their motions for summary judgment.

(4) On May 2, 1997, the district court granted the three officers' motions for summary judgment on the 42 U.S.C. § 1983 claims on the basis of qualified immunity but allowed the Estate's claim under the Tort Claims Act to

proceed to trial. At the hearing on the motions for summary judgment, the district court explained its ruling in part by stating that it believed there was evidence to support Officers LaCuesta and Hensinger's version of what happened. After the conclusion of the May 1997 trial on the Tort Claims Act claims, the Estate filed a motion under Rule 1-060(B)(1) for relief from the May 2, 1997 order. The district court denied this motion by interlocutory order because no final order regarding the jury verdict awarding damages to the Estate for the Tort Claims Act claim had been entered.[1] The Estate filed an application for an interlocutory appeal, which this Court granted.

Summary Judgment, Qualified Immunity, and 42 U.S.C. § 1983 "Deadly Force" Claims

(5) The Estate's Rule 1-060(B) motion was essentially a motion to reconsider the district court's earlier grant of partial summary judgment on the 42 U.S.C. § 1983 claim. Although a Rule 1-060(B) motion cannot be used to extend the time for appealing the order sought to be set aside by the motion, *see Deerman v. Board of County Comm'rs*, 116 N.M. 501, 505-06, 864 P.2d 317, 321-22 (Ct. App. 1993), the partial summary judgment was not a final order and the time for appeal had not yet begun to run. Accordingly, we treat the appeal of the denial of the Rule

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[1] Issues in this case involving the constitutionality of damages caps awarded under the Tort Claims Act claim are currently under review in the New Mexico Supreme Court, No. 25,112.

1-060(B) motion as encompassing an appeal of the original partial summary judgment.

(6) We review de novo the district court's grant of summary judgment. *See Hasse Contracting Co. v. KBK Fin., Inc.*, 1999-NMSC-023, ¶ 9 (No. 24,790, filed Apr. 26, 1999); *Latta v. Keryte*, 118 F.3d 693, 697 (10th Cir. 1997). In reviewing the record, we view the evidence presented in the light most favorable to the party opposing summary judgment. *See Blackwood & Nichols Co. v. New Mexico Taxation & Revenue Dep't*, 1998-NMCA-113, ¶ 5, 125 N.M. 576, 964 P.2d 137; *Latta*, 118 F.3d at 697.

(7) A person acting under color of state law who violates the rights of a plaintiff established by the United States Constitution or federal statutes may be held personally liable for his or her action under 42 U.S.C. § 1983. *See Moongate Water Co. v. State*, 120 N.M. 399, 403-04, 902 P.2d 554, 558-59 (Ct. App. 1995). Such a person is entitled to qualified immunity from suit, however, if his or her action was objectively reasonable in light of clearly established law. *See Yount v. Millington*, 117 N.M. 95, 98, 869 P.2d 283, 286 (Ct. App. 1993). The framework for reviewing appeals of summary judgment orders granting qualified immunity has been succinctly stated by our Supreme Court:

> First, a court must look at the undisputed facts and those facts adduced by the party opposing summary judgment to see if there is any evidentiary support for finding a possible violation of law. Second, if the law may have been violated, a court must ask if that law was clearly established at the time of the alleged violation.

Romero v. Sanchez, 119 N.M. 690, 692, 895 P.2d 212, 214 (1995); *see also Flores v. Danfelser*, 1999-NMCA-___, ¶ 24 (No. 19,157, filed June 4, 1999).

(8) The Estate has alleged that Officers LaCuesta, Hensinger, and Denko violated Archuleta's constitutional right to be free from unreasonable seizures under the Fourth Amendment by using excessive force to restrain him. The United States Supreme Court has clearly established that a police officer's use of deadly force is reasonable only if "the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Tennessee v. Garner*, 471 U.S. 1, 3 (1985); *see also Graham v. Connor*, 490 U.S. 386, 396 (1989). Whether an officer's action was reasonable is heavily fact dependent. *See Graham*, 490 U.S. at 396; *Wilson v. Meeks*, 52 F.3d 1547, 1553 (10th Cir. 1995). The reasonableness of the use of deadly force in any particular situation is an objective test from the perspective of the officer on the scene, with the understanding that officers must often make split-second decisions in difficult situations about what force is necessary. *See Graham*, 490 U.S. at 396-97.

(9) With the premise that the question of qualified immunity is not simply whether the action violated the constitutional standard, but whether a competent officer could have reasonably believed that the action was lawful in light of clearly established constitutional principles, *see Anderson v. Creighton*, 483 U.S. 635, 641 (1987), we turn to the question of whether summary judgment was properly granted based on the evidence before the district court.

Disputed Facts Concerning the Reasonableness of Officer LaCuesta's Actions

(10) The issue regarding Officer LaCuesta, is whether there are any material disputed facts bearing on whether Officer LaCuesta's action in shooting Archuleta was objectively reasonable under the circumstances. The reasonableness of Officer LaCuesta's shooting Archuleta depends on whether he had probable cause to believe Archuleta posed a significant threat of death or serious physical injury.

(11) The parties do not dispute that Archuleta was "seized" for purposes of Fourth Amendment analysis when he was shot. *See California v. Hodari D.*, 499 U.S. 621, 626-27 (1991) (holding that a seizure occurs only when a fleeing suspect is physically touched by the police or when he or she submits to a show of police authority). The relevant evidence is evidence that immediately prior to the shooting, Officer Hensinger may have moved to within twelve feet of where Archuleta had stopped and that Archuleta may have made a threatening gesture toward Officer Hensinger. This evidence directly bears on whether Officer LaCuesta had probable cause to believe that Officer Hensinger was in danger and whether shooting Archuleta was reasonable under the circumstances. Even assuming that Archuleta had a knife and was taking flight from the scene of a domestic-disturbance call, if the officers were a sufficient distance from him, or, if he was not making any threatening gesture toward the officers when he was shot, a reasonable officer in Officer LaCuesta's position would not have probable cause to believe that Archuleta posed a significant threat of death or serious injury. Officers LaCuesta, Hensinger, and

Denko do not argue that Archuleta posed a threat to anyone other than the officers.

(12) There was evidence that Officer Hensinger stated on the night of the shooting that he was twelve yards and Officer LaCuesta was 25-27 yards from Archuleta when Archuleta was shot. He later changed his statement to assert that he was twelve to fourteen feet from Archuleta. Officer LaCuesta testified that he believed Officer Hensinger was ten feet from Archuleta when Officer LaCuesta shot Archuleta. There was also conflicting evidence about Archuleta's movements, if any, immediately prior to being shot. In particular, there is a dispute about whether Archuleta was facing Officer Hensinger and lunged toward him or whether Archuleta had his back to Officer Hensinger. The deposition of a pathologist from the New Mexico Office of the Medical Investigator could be read to cast doubt on the officers' testimony that Archuleta made a lunging motion toward Officer Hensinger. The Estate also filed the affidavit of an accident reconstructionist who cast doubt on the veracity of the officers' descriptions of Archuleta's movements.

(13) Although Officers LaCuesta, Hensinger, and Denko objected to much of this testimony below, their answer brief does not challenge the admissibility of this evidence, and instead relies exclusively on the evidence in support of the officers' version of events and does not resolve any conflicting evidence. Because there is conflicting evidence as to how close Officer Hensinger was to Archuleta at the moment Officer LaCuesta shot Archuleta and as to whether Archuleta was moving toward Officer Hensinger or had made any threatening gesture, we reverse the summary judgment granted to Officer

LaCuesta. We need not consider any other factual disputes raised by the parties.

(14) If Archuleta did not make any threatening motion toward Officer Hensinger or if Officer Hensinger was twelve yards away from Archuleta, a jury could reasonably conclude that Officer LaCuesta did not have probable cause to believe Officer Hensinger was in immediate danger and that no reasonable officer could have believed that shooting Archuleta under this factual scenario was lawful. If, however, the jury were to believe that Archuleta did make a threatening motion toward Officer Hensinger and that Officer Hensinger was only twelve feet away from Archuleta, it could reasonably determine that Officer LaCuesta's shooting Archuleta was reasonable under the Fourth Amendment. Because there is a factual dispute surrounding the circumstances immediately connected to the shooting which includes passing on the credibility of witnesses, the reasonableness of the force used is a factual question to be decided by a jury. *See Thomas v. Roach*, 165 F.3d 137, 144 (2d Cir. 1999) (vacating summary judgment granting qualified immunity where several material facts were in dispute); *Prokey v. Watkins*, 942 F.2d 67, 73-74 (1st Cir. 1991) (affirming denial of qualified immunity on motion for summary judgment where there were material facts in dispute concerning an arrest warrant); *Zuchel v. Spinharney*, 890 F.2d 273, 275 (10th Cir. 1989) ("Neither we, nor the district court, are entitled to weigh evidence or pass on the credibility of witnesses in deciding summary judgment issues."); *cf. Slattery v. Rizzo*, 939 F.2d 213, 216-17 (4th Cir. 1991) (reversing denial of motion for summary judgment where the facts were undisputed and, based on those facts, the

officer had probable cause to believe that the plaintiff posed a deadly threat); *Hutton v. Strickland*, 919 F.2d 1531, 1539-42 (11th Cir. 1990) (reversing the denial of a motion for summary judgment based on qualified immunity where there were no disputed facts about the parties' actions).

(15) We reverse the grant of summary judgment in favor of Officer LaCuesta because there are genuine issues of material fact. *See Zuchel*, 890 F.2d at 275; *Brandenburg v. Cureton*, 882 F.2d 211, 215-16 (6th Cir. 1989) ("This court ultimately decides the law to be applied. In this case, however, the jury becomes the final arbiter of appellant['s] . . . claim of immunity, since the legal question of immunity is completely dependent upon which view of the facts is accepted by the jury."); *see also Hemphill v. Schott*, 141 F.3d 412, 417-18 (2d Cir. 1998) (holding that summary judgment was not appropriate where there was contradictory evidence of the plaintiff's actions).

Summary Judgment in Favor of Officers Hensinger and Denko

(16) In briefs filed in the district court, Officers Hensinger and Denko argued grounds for granting them qualified immunity that were independent of Officer LaCuesta's potential liability. Although the district court briefly commented on Officer Hensinger's liability independent of that of Officer LaCuesta, it appears that the district court based its ruling on the determination that the Estate failed to unequivocally rebut the evidence supporting Officers LaCuesta, Hensinger, and Denko's version of the event, and that as a matter of law, there was

no violation of Archuleta's constitutional rights. On appeal, the parties have not argued any of the independent grounds for qualified immunity regarding Officers Hensinger and Denko. The Estate's brief notes in a footnote that it submitted evidence to the district court demonstrating the existence of genuine issues of material fact relating to these grounds and that it would be inappropriate for this Court to affirm on the grounds argued by Officers Hensinger and Denko below. Officers LaCuesta, Hensinger, and Denko's answer brief relies on the determination that the deadly force used against Archuleta was objectively reasonable as a matter of law.

(17) Because these grounds were not briefed on appeal and because it appears that the district court did not give full consideration to any independent grounds for granting Officers Hensinger and Denko qualified immunity since it decided the matter on summary judgment, we reverse and remand for reconsideration the summary judgments granted to Officers Hensinger and Denko.

Conclusion

(18) Having determined that there are genuine issues of material fact, we reverse the summary judgment granted to Officer LaCuesta. We also reverse the order granting summary judgment to Officers Hensinger and Denko to allow the district court to consider the independent arguments raised by them in their motions below.

(19) **IT IS SO ORDERED.**

/s/ James J. Wechsler
JAMES J. WECHSLER,
Judge

WE CONCUR:

/s/ Rudy S. Apodaca
RUDY S. APODACA, Judge

/s/ Harris L Hartz
HARRIS L HARTZ, Judge

HARTZ, Judge (concurring).

(20) I join fully Judge Wechsler's opinion for the Court. I write separately only to emphasize that the defendant officers attempted to justify the shooting of Mr. Archuleta solely on the ground of the threat he posed to the officers' safety. In particular, they did not argue that deadly force may have been permissible because of the threat he posed to his wife or other members of the public. The United States Supreme Court stated in *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985), that if "there is probable cause to believe that [the suspect] has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." In a footnote the Court also indicated that an officer may use deadly force "to apprehend 'perpetrators who, in the course of their crime threatened the use of deadly force, or if the officer believes there is a substantial risk that the person whose arrest is sought will cause death or serious bodily harm if his apprehension is delayed,' " when the officer " 'know[s], as a virtual certainty, that the suspect committed an offense for which the use of deadly force is permissible.' " *Id.* at 9 n.8 (quoting President's Commission on Law Enforcement

and Administration of Justice, *Task Force Report: The Police* 189 (1967)).

/s/ Harris L Hartz
HARRIS L HARTZ, Judge

FOURTH JUDICIAL DISTRICT COURT
COUNTY OF SAN MIGUEL
STATE OF NEW MEXICO

No. 95-137(C)

ROSE ARCHULETA, as Personal Representative of the ESTATE OF MARVIN ARCHULETA, Deceased,

Plaintiffs,

v.

WESLEY LACUESTA, RONALD HENSINGER, JOHN DENKO, THE NEW MEXICO STATE POLICE and THE NEW MEXICO DEPARTMENT OF PUBLIC SAFETY

Defendants.

ORDER
RE: DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

THESE MATTERS having come before the Court upon the following Motions for Summary Judgment filed by the Defendants:

1. Defendant Wesley LaCuesta's Motion for Summary Judgment

2. Defendant Ronald Hensinger's Motion for Summary Judgment

3. Defendants John Denko, the NM State Police, and the NM Dept of Public Safety's Motion for Summary Judgment

A hearing having been held on these matters on April 30, 1997, with all parties represented by their respective counsel, and the Court now being fully advised in these matters, the Defendants' Motions for Summary Judgment are hereby GRANTED IN PART and DENIED IN PART, as follows:

1. The Defendants' Motions for Summary Judgment regarding all of the federal law claims, brought pursuant to Section 1983 (42 U.S.C.A. Sec. 1983), against all of the Defendants in all of their capacities, are GRANTED, and all such claims are hereby DISMISSED WITH PREJUDICE.

2. The Defendants' Motions for Summary Judgment regarding the state law claims, brought pursuant to the NM Tort Claims Act (NMSA 41-4-1, et seq.), against all of the Defendants in all of their capacities, are DENIED, and all such claims remain for trial.

IT IS SO ORDERED.

/s/ Jay G. Harris
Honorable Jay J. [sic] Harris
District Judge, Division II

Approved as to Form

Counsel for All the Defendants

Date: May 1, 1997

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FOURTH JUDICIAL DISTRICT COURT
COUNTY OF SAN MIGUEL
STATE OF NEW MEXICO

No. 95-137(C)

ROSE ARCHULETA, as Personal Representative of the ESTATE OF MARVIN ARCHULETA, Deceased,

Plaintiffs,

v.

WESLEY LACUESTA, RONALD HENSINGER, JOHN DENKO, THE NEW MEXICO STATE POLICE and THE NEW MEXICO DEPARTMENT OF PUBLIC SAFETY

Defendants,

and

NEW MEXICO ASSOCIATION OF COUNTIES, NEW MEXICO MUNICIPAL LEAGUE, and THE REGENTS OF THE UNIVERSITY OF NEW MEXICO,

Intervenors.

ORDER REGARDING PLAINTIFF'S MOTION FOR RELIEF FROM ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT REGARDING THE FEDERAL CIVIL RIGHTS CLAIMS BROUGHT UNDER 42 U.S.C. 1983

THIS MATTER, having come before the Court upon Plaintiff's Motion for Relief from Order, and the Court having reviewed and considered Plaintiff's Motion and

Supporting Memorandum of Law, the Defendants' Response thereto, Plaintiff's Reply, as well as oral argument before the Court on February 19, 1998, and the Court now being fully advised in these matters:

IT IS THEREFORE ORDERED that Plaintiff's Motion for Relief from Order is DENIED.

IT IS FURTHER ORDERED that, although this ruling does not practically dispose of the merits of the action, the Court believes that this decision involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order or decision may materially advance the ultimate termination of the litigation.

/s/ Jay G. Harris 3/18/98
HONORABLE JAY J. [sic] HARRIS
District Judge, Division II

APPROVED AS TO FORM:
/s/ Robert R. Rothstein
Robert R. Rothstein
Robert M. Ortiz
Attorneys for Plaintiff

APPROVED AS TO FORM:
/s/ Robert Lohbeck
Robert Lohbeck
Louis N. Colon
Attorney for Defendants

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
Thursday, August 12, 1999

No. 25,869

ROSE ARCHULETA, as personal representative of the Estate of MARVIN ARCHULETA, deceased,

Plaintiff-Respondent,

vs.

WESLEY LaCUESTA, RONALD HENSINGER, JOHN DENKO, THE NEW MEXICO STATE POLICE and THE NEW MEXICO DEPARTMENT OF PUBLIC SAFETY,

Defendants-Petitioners.

ORDER

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and response, and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari is **denied** in Court of Appeal number **19299**.

ATTEST: A True Copy

KATHLEEN JO GIBSON
CLERK OF THE SUPREME COURT

By /s/ Jane Gurule
Chief Deputy